

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Communications Division

RESOLUTION T-17203
April 16, 2009

R E S O L U T I O N

RESOLUTION T-17203: AT&T California (U-1001-C). In accordance with Decision 07-09-018, this resolution approves AT&T California's Advice Letter 33423 filed on August 29, 2008 seeking to detariff various retail residential and business services.

I. Summary

This resolution approves AT&T California's advice letter (AL) 33423, as revised on February 9, 2009, requesting authority to detariff certain residential and business services.

II. Background

On August 29, 2008, AT&T California ("AT&T") filed a Tier 2 advice letter (AL 33423) seeking to detariff more than 90 retail residential and business services with an effective date of October 1, 2008. This request was made pursuant to Decision (D.) 07-09-018, in which the Commission adopted a policy for URF carriers to voluntarily detariff certain retail telecommunications services.¹

In order to detariff services, an URF carrier must file an advice letter with the Commission requesting authority to cancel the respective tariffs. Traditionally, a carrier files a book of tariffs, which, when authorized by the Commission, is a document that contains rates, terms, and conditions associated with the various telecommunications services it offers to consumers. Once a carrier has detariffed its services, the carrier will no longer post its authorized prices, terms and conditions in their tariff book filed with the Commission. Instead, prices, terms, and conditions are contained in its service offerings and service agreement.²

¹ URF carriers are defined as those carriers with full pricing flexibility over substantially all of its rates and charges. "URF Carriers" include incumbent local exchange carriers (ILECs) regulated through the Commission's uniform regulatory framework ("URF") established in Decision 06-08-030, and may be modified by the Commission subsequently; the term also includes competitive local exchange carriers (CLECs) and interexchange carriers (IECs/IXCs).

² Sometimes, the service agreement contains only general terms and conditions with reference to a separate guidebook or product guide that incorporates the specific services, prices, terms and conditions. Such is the case with AT&T's detariffing proposal.

In D.07-09-018 (“the Detariffing Decision”), the Commission established an 18-month, later modified to 24-month³, window within which an URF carrier could request approval for detariffing many of its existing tariffed retail services. The Detariffing Decision requires such a request to be made through a Tier 2 advice letter filing process. If an URF carrier elects not to detariff its existing services within the Commission’s set 24-month window, the URF carrier subsequently would not be permitted the option to detariff its services.⁴

The Commission also added consumer protection rules for detariffed services by directing the carriers to maintain and publish the applicable rates, charges, terms and conditions for their detariffed stand-alone services or bundled offerings on their respective Internet websites. In addition, an URF carrier must provide a 30-day notice of any rate increases, or more restrictive terms and conditions,⁵ to customers that purchase any of the services that the company seeks approval to detariff.

On August 29, 2008, AT&T filed a Tier 2 advice letter (AL 33423) seeking to detariff more than ninety (90) retail residential and business services, and requesting an effective day of October 1, 2008. Prior to filing its advice letter, AT&T mailed a residential service agreement (“RSA”) or a business service agreement (“BSA”) and companion “notices” to its millions of residential and business customers, respectively. In the notices, AT&T informed its customers that their services would be provided based on the terms and conditions specified in the RSA, the BSA, and its Guidebook. AT&T did not mail its Guidebook, which is voluminous, to customers. However, the Guidebook was later posted on AT&T’s website. AT&T’s customers received the service agreements between July and August 2008.⁶

Subsequently, during August and September 2008, the Commission’s Public Advisor’s Office and Consumer Service Branch received hundreds of residential customer calls and written complaints about the RSA. Many indicated difficulty in understanding the RSA and expressed confusion about the purpose of RSA and the Guidebook. Many complained about the unfriendly tone of the RSA and/or expressed the sentiment that the service agreement was unfair, citing in particular the binding arbitration clause. Some customers were concerned that their services might be jeopardized and were not sure whether, and if so, what alternative providers were available.⁷

³ This detariffing period now expires on April 12, 2009.

⁴ An URF carrier may seek to detariff new services that fall into a category that the carrier has not previously tariffed after the 24-month implementation period as long as the new service does not fall into the categories of services for which the Commission does not permit detariffing.

⁵ D.07-09-018, mimeo, at 71.

⁶ Subsequently, during August and September 2008, the Commission’s Public Advisor’s Office and Consumer Service Branch received hundreds of residential customer calls and written complaints about the RSA. Many indicated difficulty in understanding the RSA and expressed confusion about the purpose of RSA and the Guidebook and were concerned that their services might be jeopardized.

⁷ Various complaints were attached to TURN and DRA’s joint protest filed on September 18, 2008, Attachment C.

III. Protests

On September 18, 2008, the Utility Reform Network (“TURN”) and the Division of Ratepayer Advocates (“DRA”) filed a timely protest (“Joint Protest”) on AT&T’s AL 33423. The Joint Protest asserted that AT&T failed to comport with the conditions and requirements established by the Commission for detariffing. In addition, the Joint Protest also argued that the AT&T proposed service agreements violated provisions of the Public Utilities Code (“PU Code”) as well as generally accepted standards of fairness under California contract law.

AT&T filed a reply to the Joint Protest on September 25, 2008. AT&T stated that its AL fully complied with the Commission’s detariffing requirements and that the Joint Protest exceeded the scope of the AL and violated the Commission’s rule covering the allowable grounds for protesting an advice letter.⁸

On October 17, 2008, the Communications Division (“CD”) exercised its authority under General Order (“GO”) 96-B, General Rule 7.5.2, and suspended AT&T’s AL to investigate the issues raised by the consumer complaints filed with the Commission, the Joint Protest, and comments made by consumers/consumer groups at the October 16 and December 18, 2008 Commission regular agenda meetings. Subsequently, AT&T informed CD that it would modify the advice letter and the RSA.

On February 9, 2009, AT&T revised its AL filing by submitting a supplemental AL that eliminated a few services from the list of services that it originally intended to detariff. The supplemental AL also made some other tariff language changes. In its supplemental filing, AT&T agreed to extend the suspension for review until July 1, 2009 for the supplemental AL.

AT&T also revised the RSA, and informally provided the RSA to Commission staff. A significant change to the RSA was the removal of the binding arbitration clause. Consistent with language in D.07-09-018, the RSA was not filed with the Commission at any time.⁹

IV. Discussion and Analysis

We will first discuss whether AT&T’s request to detariff certain residential and business services complied with the Commission’s Detariffing Decision requirements. We will then address Joint Protest’s concerns regarding the RSA.

1. Did the AL Meet the Commission’s Detariffing Requirements?

Pursuant to the Detariffing Decision, an URF carrier may seek to detariff a service by filing a Tier 2 advice letter.¹⁰ A Tier 2 advice letter review process allows a 20-day protest period, a 30-day initial review by industry division staff, and an additional 120-day review period if the

⁸ AT&T September 25, 2009 Reply to Joint Protest, at 2.

⁹ “We decline to adopt any content regulation for contracts. In a competitive market, carriers compete on both price and non-prices terms. By offering different contract terms and conditions, carriers seek to differentiate themselves from their competitors.” D.07-09-018, Section 4.6, mimeo, at 59.

¹⁰ See GO 96-B, Telecommunications Industry Rule 7.2(3), in Appendix C to GO 96-B.

AL is suspended after the initial 30-day review. Once an AL is suspended, it can only become effective upon staff approval or a Commission resolution.¹¹ The Detariffing Decision further states that staff review is necessary to ensure that the advice letter does not propose to cancel tariffs in any of those categories that are not qualified for detariffing.¹²

The Commission has determined that the following services shall not be detariffed¹³:

- Basic service¹⁴;
- 911 or E-911 service, or other emergency services;
- A provision, condition, or requirement imposed by the Commission in an enforcement, complaint, or merger proceeding;
- A provision relating to customer direct access to or choice of an interexchange carrier;
- A service (such as Resale Service) not within the scope of services for which the Commission granted full pricing flexibility in Decision 06-08-030;
- A provision pertaining to a Utility's obligations under state or federal law (such as California public policy surcharges or Carrier of Last Resort obligations), or the Commission's decisions or orders.

The Joint Protest argued that AT&T's AL 33423 included services that fall within the category of Basic Service, and hence cannot be detariffed.¹⁵ The services that Joint Protest identified as within the Basic Service includes measured service,¹⁶ local usage, and additional basic lines services.¹⁷

AT&T originally rebutted the Joint Protest by arguing that additional basic line or local usages do not fall within the basic service category.¹⁸ However, in its February 9, 2009 supplemental AL filing, AT&T removed the additional line basic service and local usage services from its detariff list. In addition, AT&T added service areas, maps,¹⁹ and free footage allowance for basic services²⁰ back to the tariffs. AT&T also further clarified that its basic service will remain tariffed and shall contain the basic service components defined by the Commission in D.96-10-066.²¹

¹¹ See GO 96-B, General Rules 7.3.4, 7.4, and 7.6.

¹² D.07-09-018, mimeo, at 51.

¹³ D.07-09-018, mimeo, at 57.

¹⁴ The term "Basic Service," is as defined in D.96-10-066 and for residence services only.

¹⁵ Joint Protest at p.7.

¹⁶ AT&T offers a flat rate and a measured rate basic residential services. A customer pays about \$13 per month for a flat rate and can make unlimited local distance calls without additional charges. A measured rate customer will pay about \$7 per month but will incur additional per minute local call charges if he makes calls exceeding the free allowance minutes.

¹⁷ Many customers purchase more than one line from AT&T; the first line is considered the primary line basic service and the rest are considered additional basic lines.

¹⁸ AT&T September 25, 2008 Reply at 3-6.

¹⁹ GO 96-B, General Rule 8.5.4 requires map(s) and description of service areas for tariffed services.

²⁰ GO 96-B, General Rule 8.5.4 requires map(s) and description of service areas for tariffed services.

²¹ AT&T detariffing supplemental matrix, December 16, 2008.

Given AT&T's revisions to its initial detariffing request via its supplemental AL filing, we find the services that AT&T seeks to detariff are permissible under D.07-09-018 and GO 96-B, as well as under Telecommunications Industry Rule 5, which addresses detariffing. Further, via the modifications contained in its supplemental AL filing, AT&T has removed services which were the subject of the Joint Protest. Therefore, we approve detariffing of the services identified in AL 33423, as supplemented.

2. AT&T's Residential Service Agreement (RSA)

The Joint Protest raised the following major issues associated with AT&T's RSA:

- AT&T does not provide sufficient information for customers to make an informed choice, in violation of P.U. Code § 2896 – the precise date on which the RSA becomes effective is unclear; the RSA is a 22-state contract and neglects the specific needs and laws of California; the RSA incorporates additional rates, terms, and conditions found in a 2581 page “Guidebook” that no consumer could be expected to digest. The RSA did not identify explicitly which services it covers.
- The RSA violates rules relating to customer notices -- The RSA is inconsistent with D.07-09-018's rule that customers receiving detariffed services must be given 30-days advance notice of any rate increases, or more restrictive terms and conditions; the RSA did not inform customers of the no-penalty opt-out option when the URF Carrier elects to unilaterally increase rates or impose more restrictive terms and conditions during a term contract.
- AT&T's treatment of bundles that include basic service should be clarified -- It is not clear if an increase of the price of a bundle that contains basic service may constitute a rate increase for the basic service component.
- AT&T's RSA violates the P.U. Code 2890(a) when RSA demands that a customer “agree[s] to pay for all charges for Services provided under this agreement even if such calls were not authorized.”
- The RSA's arbitration provisions are unconscionable and illegal under California law -- Such provisions have been found to create an unconscionable contract of adhesion under cases such as *Ting v. AT&T* (2003) 319 F.3d 1126 (AT&T long-distance Consumer Services Agreement waiver of judicial and class action rights unconscionable under California law); see also *McKee v. AT&T* (2008) 2008 Wash. LEXIS 816 (AT&T long-distance Consumer Services Agreement class action waiver, shortened statute of limitations, and related provisions unconscionable under Washington law); and *Schroyer v. New Cingular Wireless Services*, (9th Cir. 2007) 498 F.3d 976 (AT&T Wireless' class action waiver unconscionable under California law).
- RSA's limitations of liability are contrary to the Commission's Detariffing Decision, which states that any service exempted from tariffing requirements shall not be subject to the limitation on damages that applies to tariffed telecommunications services.

- The RSA provides that, in applying for services, customers give AT&T permission to obtain credit information from credit reporting agencies. This appears to give AT&T much broader access to customer's credit information.

AT&T's reply first challenged the validity of the protest on the RSA. AT&T noted that its AL did not ask for approval of the RSA or BSA; consequently, AT&T asserted, the Joint Protest exceeded the scope of AT&T's AL filing.²² Additionally, AT&T argued that the Joint Protest contained inaccuracies and misrepresentations regarding the RSA and Guidebook. Regarding Joint Protest's allegations about deficiency in providing information to customers for making informed decisions and inadequacy in customer notices, AT&T maintained that it had given customers a proper 30-day advance notice of its intent to detariff services.²³ AT&T asserted that it provided adequate information for its customers to make informed choices by mailing a paper copy of the RSA, and identifying a web link to the Guidebook. AT&T further refuted the Joint Protest's point that no customer could be expected to digest a 2581 page "Guidebook" by pointing out that the Guidebook does not contain information more complicated than the tariff provisions that the Guidebook would replace.²⁴

In response to the Joint Protest's various assertions that AT&T's RSA violated the Public Utilities Code or California law, AT&T noted that its RSA explicitly stated that the notice provision would comply with the notice period required by the Commission and California law.²⁵ AT&T also contended that it was not necessary to clarify the treatment of bundles because the Commission had granted authority to allow detariffing of bundles that include basic services.²⁶ AT&T clarified that its provision regarding authorized charges would not cover situations for new services, hence it would have no effect on slamming and cramming as the Joint Protest alleged.²⁷ In addition, AT&T asserted that, contrary to the Joint Protest's complaints, its credit check provision and arbitration clause were fair to customers, and that those provisions, including the limitation of liability, all complied with California law.²⁸

In the Detariffing Decision, we stated

TURN and DRA urge us to mandate certain disclosures in contracts entered into between carriers and customers as a replacement for tariffs while Cox urges us to rule that carriers may limit their liability in such contracts notwithstanding the language of Section 495.7(g). We decline to adopt any content regulation for contracts. In a competitive market, carriers compete on both price and non-prices terms. By offering different contract terms and

²² AT&T's September 25, 2008 reply to Joint Protest, at 2-3.

²³ Id., at 12-13.

²⁴ Id., 11-12.

²⁵ Id., 16-17

²⁶ Id., 18.

²⁷ Id., 19.

²⁸ Id., at 20-23.

conditions, carriers seek to differentiate themselves from their competitors.²⁹

In adopting policies and procedures for permissive detariffing of services, we expressed our intent not to adopt any rules governing the content of service contracts for detariffed services. Our policy in D.07-09-018 is intended to give carriers substantial flexibility to be innovative and to respond quickly to their customers' needs. On the other hand, it is crucial that the contracts between a carrier and its customers provide adequate information, including all necessary key elements, for the consumers to make informed choices. In addition, the contracts should be clear, understandable, and just and reasonable.

We were dismayed to hear so many customers complaining about AT&T's RSA. However, following staff suspension AL 33423 AT&T considered both the Joint Protest's and CD staff's input and made significant changes to its RSA and to the Guidebook to address the concerns that had been raised. Our CD staff reported that AT&T has revised the RSA so that it now does the following:

- Clearly identifies that residential basic services are not included as part of the detariffed services.
- Adds a statement that detariffing will not result in any interruption by the carrier in customers' existing services, nor will customers' existing service prices increase, which should reduce customers' fears about immediate effects to their services.
- Identifies an effective date for the service agreement.
- Removes the binding arbitration clause, which many customers considered unfair.
- Clearly identifies that customers may continue to file complaints with the CPUC
- Adds a section that specifies California CPUC requirements that contrasts with their generally applicable requirements.
- Adds the customer "no-penalty" opt-out choice clause.
- Adjusts the tone of the RSA to be more consumer-friendly.
- Shortens the length of the RSA, making it both less complex and easier to understand.

Consistent with our conclusion in D.07-09-018, we see no need to adopt content regulations for AT&T's RSA. We anticipate that the RSA and Guidebook will be routinely revised because the communications market is so dynamic. We intend for the process for carriers to roll out new products or to revise terms and conditions to be flexible. Developing specific contract content requirements for detariffed carriers beyond those already required by law is unnecessary and could result in stifling innovation resulting in more harm than benefit. Accordingly, under our detariffing decision, the Commission stated that it need not approve the specific terms of the RSA in order for it to become effective. Consistent with that view, we neither approve nor disapprove of the contents of the AT&T RSA. However, we reiterate that we do expect such contracts to be clear, informative, and just and reasonable, and to comply with federal and state law.

²⁹ D.07-09-018, Section 4.6, at 59.

V. Conclusions

AT&T's Advice Letter 33423, as supplemented complies with Commission detariffing rules, as adopted in D.07-09-018 and GO 96-B, Telecommunications Rule 5. Therefore, AL 33423 should be approved for its requested detariffed services.

In adopting the detariffing rules, the Commission did not intend to impose regulations regarding the content of agreements between a carrier and its customers for detariffed services, and we need not approve the specific terms of AT&T's RSA for it to become effective.

VI. Comments and Replies

Public Utilities Code Section 311(g) (1) provides that this resolution must be served on all parties and is subject to at least 30 days public review and comment prior to a vote on the Commission. Section 311 (g) (2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

VII. Findings

1. AT&T's Advice Letter 33423, as supplemented, complies with Commission detariffing rules adopted in D.07-09-018 and GO 96-B, Telecommunications Rule 5.
2. DRA's and TURN's joint protest raised issues that were addressed by AT&T's advice letter supplement and its revisions to its RSA.
3. The effective date of detariffing needs to be concurrent with the effective date of the service agreement.
4. Given AT&T's need to inform their customers of the revised RSA, the effective date of detariffing needs to be coordinated by AT&T.

IT IS ORDERED THAT:

1. AT&T's request for detariffing, contained in AL 33423 is approved and AT&T may set the effective date of detariffing by filing a supplement, effective immediately, indicating such date.
2. DRA' and TURN's joint protest is dismissed.

This Resolution is effective today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on April 16, 2009. The following Commissioners approved it:

Paul Clanon
Executive Director